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Attorneys for Plaintiff United States of America

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI`I

UNITED STATES OF AMERICA, and  
DEPARTMENT OF HEALTH, STATE OF  
HAWAI`I,

Plaintiffs,

v.

JAMES H. PFLUEGER; PFLUEGER  
PROPERTIES; AND PILA A 400 LLC,

Defendants.

NO. CV 06-00140 BMK

JOINT STIPULATION TO  
AMEND CONSENT DECREE

WHEREAS, Defendants James H. Pflueger, Pflueger Properties, and Pila'a 400 LLC have stated they are unable to obtain the bond that the County of Kaua'i has stated is a condition to issuing a grading permit that would have allowed the work set forth in Appendix E to the Consent Decree ("Package 2 work") to be performed pursuant to the original schedule set forth in Appendix I to the Consent Decree;

WHEREAS, the County of Kaua'i regarded Defendants' other offers of financial assurance as inadequate;

WHEREAS, the County of Kaua'i and Plaintiffs, the United States, the State of Hawai'i, and the Limu Coalition and the Kilauea Neighborhood Association ("Citizens"), do not concede and specifically dispute that Defendants cannot provide financial assurances that would be acceptable to the County; and

WHEREAS, the parties believe that the public interest is best served by entering the present settlement to ensure that Defendants commence Package 2 work as early as possible in May 2007;

NOW, THEREFORE, the parties enter into this Joint Stipulation to Amend Consent Decree ("Joint Stipulation"), and hereby agree as follows:

1. Appendix F to the Consent Decree has been revised to include new paragraphs in Section 1.06 A.3. and 1.06 B.3. The revised Appendix F (Revised Consent Decree Version - May 1, 2007) is substituted and shall be attached to and incorporated into the First Amended Consent Decree.
2. The schedule in Appendix I to the Consent Decree has been revised. The revised Appendix I is substituted and shall be

attached to and incorporated into the First Amended Consent Decree.

3. The milestone deadlines in Appendix H to the Consent Decree have been adjusted to reflect the revised Appendix I schedule. The attached Revised Appendix H is substituted and shall be attached to and incorporated into the First Amended Consent Decree.
4. The parties have attached a copy of the First Amended Consent Decree to this Joint Stipulation. The First Amended Consent Decree remains the same as the Consent Decree entered by the Court on June 19, 2006, except for the following changes:
  - a. A new cover sheet is added to reflect a change in the caption.
  - b. Pages 16 and 16A are substituted to add a new Status Report requirement as Paragraph 31.d. of the First Amended Consent Decree as follows:
    - d. Status Report
      - (1) No later than twenty-one (21) calendar days after the completion of Task 59 in Gulch 2, Defendants shall submit a written status report to all Plaintiffs and the County containing, at a minimum, the following information: 1) the date that the Task was completed; 2) any problems encountered and how they were resolved; and 3) the date upon which Defendants are prepared to begin work on Gulch 4; and
      - (2) No later than twenty-one (21) calendar days after the completion of Task 73 in Gulch 4, Defendants shall

submit a written status report to all Plaintiffs and the County containing, at a minimum, the following information: 1) the date that the Task was completed; 2) any problems encountered and how they were resolved; and 3) the date upon which Defendants are prepared to begin work on Gulch 3.

c. Page 17 is substituted to update contact information in Paragraph 32.

d. Page 28 is substituted to update contact information in Paragraph 56.

e. Pages 37, 38, and 38A are substituted to amend Paragraph 68.g. and 68.g.i. in the First Amended Consent Decree as follows:

g. Defendants shall pay all reasonable and necessary costs, fees, and expenses of the Citizens' Monitoring Team for completion of the Citizens' Monitoring Team's duties described herein, as follows:

i. Within 15 days after the Effective Date of this Consent Decree, Defendants shall place \$10,000 into an escrow or trust account. No later than May 1, 2007, Defendants shall transfer all funds remaining in the aforementioned escrow or trust account into an interest-bearing account (the "Monitoring Fund"). Thereafter, until termination of this Decree, or July 5, 2012, whichever is earlier, Defendants shall, each year no later than July 5 of that year, place an additional \$10,000 into the Monitoring Fund. All funds Defendants place in the Monitoring Fund, together with

all interest accrued, shall be available to pay the necessary costs, fees, and expenses of the Citizens' Monitoring Team, pursuant to the procedures set forth herein.

- f. Pages 46, 47, and 47A are substituted to update contact information and add fax numbers and e-mail addresses in Paragraph 83, and to allow for transmission of notices by e-mail in Paragraph 85.
  - g. A revised Appendix F is added.
  - h. A revised Appendix H is added.
  - i. A revised Appendix I is added.
5. Pursuant to Paragraph 82.b. of the Consent Decree, the Citizens intend to seek an award of fees and costs for work reasonably spent in connection with this Joint Stipulation. Defendants assert that the Citizens are not entitled to such fees and costs in part because Defendants have not caused the need for the changes to the Consent Decree. If the Citizens and Defendants are unable to reach agreement as to the Citizens' entitlement to and/or the amount of such an award, the Citizens may file a motion with this Court for the recovery of fees and costs no later than ninety (90) days after entry of this Joint Stipulation as an Order.
6. The parties have attached a copy of the First Amended Consent Decree to this Joint Stipulation and request that it be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding

the First Amended Consent Decree disclose facts or considerations indicating that the First Amended Consent Decree is inappropriate, improper, or inadequate. Defendants, the State of Hawai'i, the Citizens, and the County of Kaua'i consent to entry of this First Amended Consent Decree without further notice. After it has received and considered any public comments, the United States will file a motion, requesting further action from the Court.

7. Defendants have submitted an application for a grading permit to the County of Kaua'i for Package 2 work in Gulch 2. The parties agree that Defendants may and should commence Package 2 work related to Gulch 2 under the Consent Decree as soon as possible after the County of Kaua'i issues the grading permit, without waiting for the eventual entry of the First Amended Consent Decree by this Court.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA:

Dated: June 27, 2007

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ROBERT D. MULLANEY  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
United States Department of Justice

FOR THE STATE OF HAWAI'I:

Dated: 5-24-07

KATHLEEN S.Y. HO //\_\_\_\_\_  
Deputy Attorney General  
Department of the Attorney General,  
State of Hawai'i

FOR THE LIMU COALITION AND THE KILAUEA NEIGHBORHOOD ASSOCIATION:

Dated: 5-21-07

DAVID LANE HENKIN  
Earthjustice



FOR THE COUNTY OF KAUAI:

Dated: May 18, 2007

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RONALD MICHIOKA  
Ayabe, Chong, Nishimoto, Sia &  
Nakamura

FOR JAMES H. PFLUEGER, PFLUEGER PROPERTIES, AND PILAA 400 LLC:

Dated: MAY 22 2007

JAMES H. PFLUEGER

JAMES H. PFLUEGER

Pila'a 400, LLC, a Hawai'i limited liability company

By JAMES H. PFLUEGER, its Manager

Pflueger Properties, a Hawai'i limited partnership

By JAMES H. PFLUEGER Trustee of the James H. Pflueger Revocable Living Trust created under Trust Agreement dated March 20, 1984, as amended, Its General Partner

Dated: MAY 22 2007

WESLEY H.H. CHING  
Fukunaga, Matayoshi, Hershey & Ching

FOR JAMES H. PFLUEGER, PFLUEGER PROPERTIES, AND PTLAA 400 LLC:

Dated:

5/23/07

NOEL WISE  
Wise Gleicher

CERTIFICATE OF SERVICE

I hereby certify that, on June 27, 2007, by the methods of service noted below, a true and correct copy of the foregoing was served on the following:

Served Electronically through CM/ECF:

Wesley H.H. Ching  
Fukunaga Matayoshi Hershey & Ching

Attorney for Defendants

David L. Henkin  
Earthjustice

Attorney for Plaintiffs in *Limu Coalition et al. v. James H. Pflueger, et al.*, No. CV 02-00521 SPK BMK

Kathleen S. Ho  
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[kathleen.s.ho@hawaii.gov](mailto:kathleen.s.ho@hawaii.gov)

Attorney for Plaintiff State of Hawai'i

Served Electronically to E-mail Account, by permission:

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Attorney for the County of Kaua'i

Noel Wise  
wise@wiseqgleicher.com

Attorney for Defendants

Dated: June 27, 2007

ROBERT D. MULLANEY